coming paupers, — the loans might be justified. Though the court dispute it, the public benefit is as indirect here as in the principal case, and the rule logically enforced would seem to require holding the act bad in both instances. The truth seems that no courts are wholly logical in enforcing the rule. Most courts allow bounties for enlistments, and pensions too, though the benefit is direct to the individual. The same courts both allow corporations to take land by eminent domain on the ground that the establishment of great manufacturing industries is a public purpose, *Jordan* v. *Woodward*, 40 Me. 317; *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467; and, also, hold that the establishment of these same industries cannot be assisted by public loans, because the object is not a public purpose. *Allen* v. *Inhabitants of Jay*, 60 Me. 120. Considering these conflicting holdings it would seem that the rule, so far as it goes, is a mere instrument for the transfer of legislative power to the courts. That whereas previously the legislative judgment that the object was public was presumed correct till the contrary was shown "beyond a reasonable doubt," now, by this rule, this judgment is presumed mistaken till the courts are persuaded of the necessity. The rule has many limitations. See 5 HARVARD LAW REVIEW, 30. It is probably more of an excuse than a reason seriously relied on. But it is worthy of notice as an indication of that judicial encroachment which some say bids fair eventually to change our whole system of government.

EVIDENCE OF CHARACTER. — With a view to clemency, evidence of the character of a party to the litigation is admissible in criminal cases within certain limits. The privilege is not open to the prosecution until the accused raises the question; and the proof is also confined to evidence of the general reputation of the person whose qualities are under discussion. In those civil suits, such as libel and slander, in which character, by a rule of substantive law, becomes a material fact in the case, it may, of course be duly proved, there being no question of the law of evidence. In cases of negligence, however, and in other civil suits, proof of character as a ground for inference to conduct stands on a different footing. In *Missouri K. & T. Ry. Co.* v. *Johnson*, 38 S. W. Rep. 568, the plaintiff, an engineer of the defendant company, brought action for injuries received in a collision. The company claimed that he disregarded signals and was asleep at his post. The engineer, backed by the testimony of his fireman, insisted that he was engaged in other duties and was unable to be on the lookout. In rebuttal the defendant offered to prove that the plaintiff was in the habit of going to sleep while running his engine. This evidence, excluded below, was held inadmissible by the Supreme Court of Texas, who said that the fact that such a habit existed was without sufficient probative force to affect the determination of the question.

The result reached is clearly correct and follows the great weight of authority. *Southern Kansas Ry. Co.* v. *Robbins*, 43 Kan. 145. The court, however, do not find the true basis for the rejection of such evidence. As a matter of such reason such habits of carelessness on the one hand or of diligence on the other may be of distinct probative value. Still they are unacceptable as tending to prejudice the man in the minds of that peculiar tribunal, the jury, which affects so widely the law of evidence. The dangerous character of this medium of proof outweighs

its demonstrative value. Thayer, Preliminary Treatise on Evidence, p. 525.

It is to be noticed that there is a class of decisions much like the present in which there is a distinct conflict of authority. Where, unlike the principal case, there is no eyewitness to the accident, some courts allow the admission of past habits as sole proof of care or of negligence, as the case may be. *Chicago, R. I. & P. Ry. Co.* v. *Clark*, 108 Ill. 113. But there is on principle no distinction between this class of cases and those of which the present is an example. Such evidence should be always excluded. And the attitude of some courts in thus disregarding the true nature of the tribunal to which this proof is offered can only be explained by a desire to prevent hardship. Such decisions, then, as *Chicago, R. I. & P. Ry. Co.* v. *Clark, supra*, afford small reason for doubting the soundness of the result reached in the principal case.

IMPOSSIBILITY AS A DEFENCE. — That land taken by compulsory process is freed from restrictive covenants when their performance becomes impossible, is ruled in a recent English case. *Anderson* v. *Manchester, S. & L. R. R.*, 52 Solicitors' Journal, 396. A railway company were authorized by statute to take certain premises. A part of this land was then held under a lease with a covenant for quiet enjoyment. The lessor conveyed the reversion to the railway company. The railway company afterward used the property in a way that would clearly have made them liable to the lessee upon the covenant had they been ordinary assignees. But the Divisional Court held that this assignment was compulsory and that the covenant did not run with the land against the company, since that covenant only contemplated voluntary assignees. To enforce it in the face of the statute, the court say, would be to enforce an impossibility.

A man may bind himself by an absolute contract to perform at all events or to do the impossible. But there is an accepted doctrine in qualification. Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the parties when the contract was made, a party will not be held liable by mere absolute words which, though large enough to include the contingency, were not used in view of it. *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180; *Harrison* v. *Muncaster*, [1891] 1 Q. B. D. 680. So confident are the courts of their rule and of their reason that they now assert that these provisions against various impossibilities are conditions of the original promise — that to enforce them is simply to enforce the actual contract which the parties have made. *Howell* v. *Coupeland*, L. R. 1 Q. B. D. 258; *Chicago, M. & St. P. R. R.* v. *Hoyt*, 149 U. S. 1.

But is it not an absurdity to make the test the contemplation of the parties — a question of fact — when it is notorious that the parties have none of these contingencies in mind? Parties in contracting commonly contemplate performance, not breach. Now the accepted statement, it is seen, looks to a solution of the problem upon legal grounds by this interpolation of a fictitious condition. The result reached is just; but is the method justifiable? Where one is under a legal obligation he must usually perform to the letter. Such was the rule anciently: fraud, illegality, duress, and the like did not excuse at law. 9 HARVARD LAW REVIEW, 49. So it was once of impossibility. Y. B. 22 Edw. IV. pl. 26.